Supreme Court, U.S.
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No. 97-1103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROL A. ELEWSKI,

Petitioner,

—vs.—

CITY OF SYRACUSE, and ROY BERNARDI,
in his official capacity as Mayor of the City of Syracuse,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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February 12, 1998

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I

THE DECISION BELOW IS INCONSISTENT WITH *ALLEGHENY* COUNTY

Respondents cite as governing law a sentence from *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984): "In this case, the focus of our inquiry must be on the creche in the context of the Christmas season." Building on the premise that that sentence requires an evaluation of the challenged creche in the context of holiday displays scattered throughout the City, Respondents assert that the only issue before the Court is factual, not worthy of this Court's attention.

The difficulty with this argument is that, as explained at length in the Petition (pp. 10-13), the cited sentence was interpreted otherwise in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

The question raised by Petitioner is what legal standard governs disputes about the constitutionality of officially sponsored religious symbols—whether, as the court below held, the focus should be the Christmas season as celebrated in all of the city, or on the symbol and its immediate physical environs. As demonstrated in the Petition, *County of Allegheny* commands a focus on the religious display and its immediate environs.

Respondents do not challenge Petitioner's assertion that the Second Circuit did not focus on the creche and its immediate environs. They likewise do not challenge Petitioner's reading of *Allegheny County*. The palpable inconsistency of the decision below with *Allegheny County* calls for the exercise of this Court's jurisdiction.

Respondents cite Justice O'Connor's concurrence in *Capitol Square Review and Advisory Board v. Pinette*, 115 S.Ct. 2440, 2455 (1995), for the proposition that "the knowledge attributed to the reasonable observer [cannot] be limited to the information gleaned simply from viewing the challenged display." The quotation does not help Respondents.

First, to read Justice O'Connor in *Pinette* as insisting on a focus broader than the symbol and its immediate environs in assessing whether a symbol is religious is to create a contradiction between her opinion in *Allegheny County*, 492 U.S. at 625-27, and her opinion in *Pinette*, a contradiction Justice O'Connor herself did not see.

Second, the issue in *Pinette* was not whether the cross was a religious symbol, but whether private use of the area around the Capitol for religious speech constituted official endorsement of religion. A majority of the Court thought that the answer to that

question turned on whether access was generally available, and that required a broader inquiry than just a glance at the religious symbol. On the question of whether the cross was a religious symbol, a majority of the justices stated that because the cross stood alone, it was plainly a religious symbol, notwithstanding all the other symbols displayed in the Square.

Justice O'Connor herself noted that the fact that the cross stood unattended at the seat of government "arguabl[y] intimat[ed] government approval," *id.* at 2453; a view shared by Justice Souter (for himself, Justice Breyer and Justice O'Connor). "[D]isplay of the cross alone could not reasonably be taken to have any secular point.") *Id.* at 2461. Justice Stevens thought this private religious display unconstitutional, because "we should be mindful of the power of a symbol standing alone and unexplained." *Id.* at 2466. Justice Ginsberg expressed a similar view. *Id.* at 2474-75. Nothing in *Pinette*, then, is in any way inconsistent with *Allegheny County*'s focus on the displayed symbol and its immediate physical environs when the question is whether a symbol is understood to convey a religious message.

II
THIS COURT SHOULD PASS ON THE QUESTION OF STANDING

Respondents dismiss Petitioner's standing argument as if it were one about some technical doctrine which could be barred by laches. But Petitioner did not suggest a mere technical problem. The Petition explained why Petitioner may have lacked standing in the court below,[1] and why, therefore, the court below may have been without constitutional power to decide this case.

The issue was not held in reserve, as Respondents charge. Petitioner promptly notified the Second Circuit of her new address. Although that notification, in retrospect, might have been written more crisply it suffices to absolve Elewski of Respondents' charge that she is manipulating the judicial system. Elewski's letter was sent to counsel for the Respondents, who made no effort to suggest

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1. See, *Lyons v. City of Los Angeles*, 461 U.S. 95 (1983) (where claim for injunctive relief is moot as to plaintiff, plaintiff lacks standing to pursue legal issue and court has no power under Article III to determine cause).

that the case was moot, perhaps because Syracuse was reluctant to give up its victory in the District Court.

Respectfully submitted,

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